CONCISE STATEMENT OF THE CASE

An Attorney successfully represented his Client, but in the process encountered clerical errors that led to miscommunications regarding a continuance, for which the Attorney was ordered to show cause. On the day of the show cause hearing, the Attorney appeared as ordered, passed the case on first call on what was that morning a lengthy docket, notified opposing counsel (and his Client, who accompanied him to court) that he needed to step out briefly to attend to another matter in a nearby courtroom but would return shortly.

Upon his return, he learned that his matter had been transferred to another courtroom on another floor, which, after he located it, he found closed. He learned that the judge in that courtroom had called the case, tried him in his absence, found him in contempt, and spoken of him so harshly that the Client was "scared" and tempted to cease retaining him.

Century-old precedent in the jurisdiction establishes that failure to be present under such circumstances cannot be contempt. Accordingly, the Attorney hastily – and emotionally – filed a Reply pointing out that the judge had erred in finding him in contempt and that to the extent that it concluded otherwise, the order contained falsehoods. Based on that Reply, the Respondent Bar Association instituted disciplinary proceedings, which were dismissed on all but one ground. Based on a finding of violation of the rule prohibiting impugning the integrity of the judiciary, a 90-day suspension of the Attorney's license was ordered. It is from this order that the Attorney now appeals.

REASONS TO ALLOW THE WRIT

The Reply on which the Attorney's sanctions were based contained statements that were either completely true, substantially true, or based on reasonable belief in their truth in light of established precedent and the existing facts.

Under such circumstances, a finding of willful contempt is unwarranted and would undermine the faith of attorneys nationwide in established local practices and courtesies, and it also would have a chilling effect on the First Amendment rights of all attorneys, who understandably would feel cautious about speaking candidly to members of the judiciary. Additionally, it would be contrary to the rule of absolute privilege accorded judicial proceedings.

APPENDIX

The information required to be included in the Appendix is voluminous and is presented in a separate volume.

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW DOMINICK A. PILLI ("Mr. Pilli") and hereby files this Petition for Writ of Certiorari (the "Petition") appealing from the judgment of the Virginia Supreme Court entered on April 22, 2005. In support of the Petition, Mr. Pilli respectfully states as follows:

I. FACTUAL BACKGROUND

A. The Chain of Events in Late 2001.

1. The (Successfully-Defended) Underlying Action.

On September 17, 2001, Walter Bordeaux (the "Client") retained Mr. Pilli to defend him in a traffic case in Fairfax County General District Court. *Joint Appendix ("Appx") 212.* Mr. Pilli successfully resolved the matter on January 17, 2002. *Appx 155.* However, he now has spent nearly four years battling to clear his good name based on what happened in the process as a result of unfortunate clerical errors in scheduling that setting.

2. The Continuance Request and Related Clerical Mistakes.

Mr. Pilli had a previously-scheduled trial hours away on the original October 16, 2001 trial date and filed a motion for continuance to the next date available for him, the Client, and the officer: January 17, 2002. *Appx 186, 217.* Local Court practice is to grant first-time continuance requests, and his secretary confirmed with a court clerk that the request would be granted and the motion continued to January 17, 2002. *Appx 217.* Nonetheless, District Judge Michael Cassidy ("Cassidy") didn't see paperwork noting that date, called the case on

October 16,[1] and issued a show cause summons when Mr. Pilli did not appear. *Appx 186, 188.*

3. Local Practice and Comedy of Errors Led to Missed Hearing.

Mr. Pilli appeared with his client for the show-cause hearing as scheduled on December 11 in Courtroom 1A. *Appx 125, 151, 163, 181-82, 188-89, 196-97, 202.* After passing the case, he notified the prosecutor that he needed to step out briefly to handle another matter in a nearby courtroom whose docket was significantly lighter. *Appx 151-52, 181-82, 213.* While he was out, the hearing was transferred to Cassidy's courtroom on another floor. Upon his return, Mr. Pilli found the new location, where the docket already had ended. *Appx 152-53, 181-82, 213.* The Client had notified Cassidy that Mr. Pilli was in another courtroom (*Appx 199*), but Cassidy tried him in his absence, found him in willful contempt, and rebuked him behind his back so harshly that the Client was "scared," upset, and considered hiring another attorney. *Appx 153-54, 161-63, 180-82, 198-99, 203.* Upon reviewing Cassidy's orders citing contempt of court, Mr. Pilli quickly filed the Reply in a hasty attempt to set the record straight before the holidays. *Appx 158, 161-64, 180; Pilli v. Virginia State Bar*, 611 S.E.2d 389, 392 (Va. 2005).

4. Court Refusal to Right Initial Wrong Caused Intense Frustration.

Thus, in a decidedly un-funny comedy of errors, a court clerical mistake led to an improper change of setting to a date on which a motion clearly stated a conflict. *See Appx 193-94.* The court clerk confirmed that the request was not forwarded to Cassidy. *Appx 196.* The continuance was approved, but the date was moved to the wrong date. *Appx 196.* Mr. Pilli's inability to appear while simultaneously appearing for a

---

[1] Apparently, because the court did not have a January date available for the officer, the January setting was changed to the then-next available date for the *court*, which at that point was October 16.

previously-scheduled matter over 150 miles away led to the issuance of the contempt order culminating in these proceedings.

Cassidy reduced the sanction, but the injustice and indignation remain. *Appx 198-99, 203-04.* Four years later, he seeks to resolve what began as clerical error but exploded when he responded heatedly in frustration over not wanting to lose a client based on an inaccurate application of Virginia law to existing facts.

B. These Proceedings.

1. Alleged Misconduct and Punishment.

Years after Mr. Pilli successfully defended his Client, Respondent filed misconduct charges against him, ultimately dismissing all but one but concluding that he made statements with reckless disregard about Cassidy's qualifications and integrity in violation of Rule 8.2 of the Virginia Rules of Professional Conduct ("Rule 8.2"), focusing on the Reply to Cassidy's Supplemental Order (the "Reply"), in which he wrote that Cassidy had skewed facts, failed to tell the truth, and was "inaccurate, and wrong." *Appx 1-5, 12; Pilli*, 611 S.E.2d at 390. Respondent ordered Mr. Pilli's law license suspended for 90 days. *Id.* at 391; *Appx 13, 205-10.*

2. Procedural Posture.

From Respondent's order, Mr. Pilli appealed to the Virginia Supreme Court, arguing that statements in his pleadings were opinions (protected free speech) or were factual in nature with an objectively reasonable basis, and at any rate were not made with reckless disregard as to their truth or falsity. *Pilli*, 611 S.E.2d at 390.

The Virginia Court recognized that the pleadings responded to what likely were staff mistakes, but it nonetheless mandated a 90-day suspension of Mr. Pilli's law license, which

began on June 22, 2005, after having been stayed pending the appeal to the Virginia Court. *Id.* at 392.

It is from that Judgment that Mr. Pilli seeks relief from this Honorable Court.

II. ARGUMENT & AUTHORITIES

Mr. Pilli pursues this appeal strictly on principle. He asks only that the record be set straight to clarify that he did not act with willful or knowing contempt. That is the only finding possible under the facts and long-standing Virginia law – and it is of nationwide importance, impacting hundreds of thousands of attorneys, their staffs, and the courts in which they practice.

Disregarding even the initial errors that led to the contempt hearing, Mr. Pilli was sanctioned for missing that hearing when it was moved while he had stepped out briefly to a nearby courtroom – *after* he had appeared and passed it once. Century-old precedent squarely on point holds that an attorney cannot be held in contempt under these circumstances. *Wise v. Commonwealth*, 34 S.E. 453, 453 (Va. 1899). Mr. Pilli's response, distilled to its barest essence, merely pointed out the inaccuracy of Cassidy's conclusion that he acted contemptuously.

Besides chilling lawyers' First Amendment freedoms, it is easy to imagine the slippery slope down which the practice of law might slide if this contempt stands. Rather than relying on one another's integrity and common courtesy to efficiently cover numerous matters, lawyers nationwide would have to document every move for fear of a situation like this – squarely addressed by the *Wise* decision, to overturn which would be to cause a result undesirable to any member of the legal community.

A. Even Frustrated Response Failed to Rise to Level of Violating Rule 8.2.

Mr. Pilli was intensely frustrated when he first was ordered to show cause why he should not be held in contempt for failure to appear on an unscheduled trial date; then, having appeared at the appointed place and time for the contempt hearing, it was moved to another courtroom on another floor while he briefly stepped out to a nearby courtroom. His

expression of that frustration may not have been the most professional response to those events, but his candid expression was not untruthful, unethical, or sanctionable. *Appx 161-65.* Even to the extent that his expression of frustration might be objectionable, it was protected First Amendment expression. Mr. Pilli understandably was infuriated by the quagmire of clerical blunders he encountered:

- He timely requested, and his secretary confirmed, a continuance to January 17, 2002.
- When the case was called prematurely on October 17, 2001 and an order to show cause issued, he responded promptly and responsibly requested a hearing.
- When he appeared for that hearing and the case was called on the heavy docket, he passed, notified his Client and the prosecutor that he needed to step outside to attend to another matter in a nearby courtroom but would return, and left, returning shortly.

Mr. Pilli acted professionally and appropriately under local practice and long-established Virginia law – yet Cassidy called his behavior knowingly contemptuous, which was simply incorrect. Mr. Pilli thought it wrong for Cassidy to tell the public, legal community, and Client that he acted contemptuously; the Reply merely said so.

1. A Response to an Erroneous Allegation of Contempt was not Mr. Pilli's Best Work.

Mr. Pilli does not contend that the Reply exemplifies quality legal writing. *Appx 161-62, 164-65.* Rather, it was penned in a single draft immediately after receiving Cassidy's two orders added insult to injury in a series of frustrating misunderstandings stemming from what the Virginia Supreme Court has recognized was likely a staff error beyond Mr. Pilli's knowledge or control. *Pilli*, 611 S.E.2d at 392; *Appx 158, 180-81.*

Cassidy's order stated that Mr. Pilli had exhibited "lack of respect" for legal process and had knowingly acted contemptuously – which was incorrect under the existing facts and established Virginia law. *Appx 199.* The Reply sought to clarify this inaccuracy. *Appx 161-66, 180-81.* Thus, the Reply expressed understandable frustration in the face of a series of errors that wasted his time and undermined his Client's confidence. *Appx 162-63.* Mr. Pilli successfully defended his Client, but found Cassidy's focus turned to his own conduct, which Cassidy criticized in his absence to the point of scaring his client almost into firing him. *Appx 153:14-18, 154:5-14.* The Client decided to retain Mr. Pilli, who ultimately prevailed in defending him by obtaining a dismissal on the January 17, 2002 date. *Appx 155.* However, despite this swift and successful representation of his Client in the underlying matter, Mr. Pilli subsequently has been forced to live through its aftermath for four more years.

Mr. Pilli's frustration was evident when he could not convince Cassidy that he was in court as ordered. Respondent's opinion supports Mr. Pilli on the primary allegation of failure to appear in court. Cassidy's second order described his explanation as "shifting" (*Appx 203*), the opinion stated:

> The statements in that voicemail [*Appx 190-91*] to not materially conflict with the Coleman affidavit [*Appx 217*], and can be seen as an attempt by and attorney to make sense out of what should have been a very ordinary situation but which had instead spiraled out of control.

Appx 11. The evidence confirms that Mr. Pilli's messages were consistent. *Appx 205-210, 212-17.* The Reply was a hasty effort. The April 9, 2002, response contains the same substance but speaks in a more eloquent, professional manner. *Appx 190-91, 212-17.*

2. The *Wise* Decision and Context Justified Mr. Pilli's Frustration.

Respondent has recognized that the Reply was fashioned and submitted hastily "immediately" after Cassidy's contempt finding. *Appx 9*. Although Mr. Pilli is not proud of the Reply as an example of his best legal writing, the context within it was penned must be remembered. The Virginia Supreme Court established more than a century ago that an attorney is not guilty of contempt for his absence from a court setting under these circumstances. *Wise*, 34 S.E. at 453.

In the *Wise* case, as here, the attorney had simultaneous settings in two separate courts, for both of which he could not appear at the same time. *Wise*, 34 S.E. at 453. Like Mr. Pilli in December 2001, the *Wise* attorney was faced with juggling two simultaneous settings. *Id.* The Virginia Supreme Court noted that even if it were offensive not to keep one engagement to be present and proceed with a trial setting:

> it would have been a far more serious violation of his duty to his client and to the police court to abandon [the other setting]. He was, therefore, placed in the position, if the judgment of the county court be sound, of being punished for an election between inconsistent duties, whatever his choice might have been. The whole tenor and spirit of his conduct, when he found himself thus embarrassed, is marked, *not by a disposition to be guilty of a contempt of the jurisdiction of any court*, but disclosed a courteous and respectful consideration for each of them. The county court might very properly have pursued the one or the other of two courses: It might have continued the case to another day, or to a succeeding term, or it might have proceeded with the trial in the absence of plaintiff in error; but it could not punish for a contempt of court when it is manifest that no contempt of its authority was intended, and when the facts of the case are not only consistent with innocence

> of any offense, but are indeed inconsistent with any other hypothesis.

Id. at 453-54 (emphasis added). Mr. Pilli found himself in the not uncommon position of having to be in two places at once. Consistent with local (and nationally widespread) practice, he informed opposing counsel of the conflict, stepped out briefly to address the second matter, then returned to resolve the first. Faced with such "election between inconsistent duties," the scenario is identical to the *Wise* case, which the Virginia Supreme Court over one hundred years ago expressly held could not be marked "by a disposition to be guilty of a contempt of the jurisdiction of any court." *Wise*, 34 S.E. at 453. Cassidy's contempt finding not only was insulting under the circumstances, but legally incorrect. The Reply – albeit inartfully penned – should not be the basis for further contempt merely because it pointed out the judicial error in the contempt finding, which is what, boiled down to its barest essence, it did.

B. Basing Punishment on the Reply Would Violate Mr. Pilli's Constitutional Rights.

Mr. Pilli takes his profession and its integrity seriously. The Reply, while admittedly heated, cannot be read to have been made with reckless disregard for the truth in violation of Rule 8.2. Mr. Pilli's contention that he should not have been held in contempt under the circumstances is supported by local practice and by hundred-year-old precedent squarely on point. A conclusion that he knowingly acted contemptuously is simply wrong. The Dictionary defines "impugn" as "to attack as false or questionable; challenge in argument." AMER. HERITAGE DICTIONARY OF THE ENG. LANG., 4th Ed. (2000). Thus, the Reply could "impugn" Cassidy's contempt order. *Appx 166.* But speaking falsely – or any erroneous action – could render the same result – and truthfully pointing out these falsehoods should not subject the speaker to punishment. The relevant facts and the *Wise* precedent establish that Mr. Pilli was not knowingly contemptuous. Statements that Cassidy was "lying," wrong, or skewed the facts, while not complimentary,

nonetheless were correct if the facts and Virginia law were as Mr. Pilli understood them to be, since a statement that is false is "lying." ROGET'S NEW MILLENNIUM THESAURUS (1st Ed. 2005). These statements clearly were not willfully or knowingly contemptuous.

1. Due Process Deprivation.

Preliminarily, it should be noted that Respondent never formally took issue with the Reply:

> At the outset, it should be stated that the Board did not consider any statements made by Mr. Pilli in the Complaint that he filed with JIRC. Although exhibit 17 was admitted into evidence, it was felt that the statements therein were directed at the judicial complaint that Mr. Pilli was filing, which was otherwise privileged. Although he waived that privilege by also filing that complaint with the Virginia State Bar and with the Virginia State Bar Disciplinary Board, he did not publicize it publicly [sic].

Appx 11-12. However, Respondent's ten-page opinion addressed the relevant allegation:

> In that pleading filed in the clerk's office where Cassidy sits, [Mr. Pilli] attacked Judge Cassidy for inappropriate and inaccurate statements, failing to tell all of the facts and failing to tell the truth, skewing the facts, and exhibiting a lack of patience and tolerance. He further asserted that he "could not tolerate a Judge lying to this Court, to this Attorney, to the Judicial Review Commission and to the Virginia State Bar."

Appx 9, 211. Respondent never charged Mr. Pilli with misconduct relating to the Reply.

Respondent's *only* reference to an objectionable document was the statement that "On December 15, 2001, [Mr.

Pilli] filed a Complaint against Cassidy with the Judicial Inquiry and Review Commission in which he made false statements about the judge's qualifications and integrity." *Appx 1-5.* Those statements were based on Cassidy's alleged violation of the Code of Ethics for a judge as set out in the Virginia Judicial Inquiry and Review Commission Rules pamphlet. This Court has held that discipline for violations not alleged in a complaint violate due process because of lack of fair notice. *In re Ruffalo*, 390 U.S. 544, 550-51; 88 S.Ct. 1222; 20 L.Ed.2d 117 (1968). Fairness dictates that Mr. Pilli should not be disciplined for charges that were not part of the formally-served charge.

2. Opinions Expressed in the Reply were Protected First Amendment Speech.

a. Rule 8.2 has Nationwide Significance.

Because Rule 8.2 exists in some form in the rules governing attorneys' conduct in all US jurisdictions, this appeal is of significant nationwide concern, impacting hundreds of thousands of attorneys. Attorneys must feel free to candidly express their honest views regarding the facts, laws, and application of those laws in any legal proceeding. Such candor would seem particularly important in matters related to judicial integrity. The legal profession governs its own conduct. *See McGrane v. Reader's Digest Ass'n, Inc.*, 822 F.Supp. 1044, 1048 (S.D.N.Y. 1993). For that reason, candor in matters between and involving members of the legal community should be even more crucial than in proceedings involving simple defamation. The statements in the Reply were true, or at least based on Mr. Pilli's reasonable belief in their truth. In any event, they were not made with reckless disregard for their falsity. Such statements, believed to be true by the attorneys who utter them, should not be suppressed in any context – much less in the context of lawyers governing themselves.

b. Expressions of Opinion Protected by the First Amendment.

Pure expressions of opinion are protected by the First Amendment. U.S. Const. Article 1, § 12; *Fuste v. Riverside Healthcare Assoc., Inc.*, 575 S.E.2d 858, 861 (2003) (challenged statements provably false); *Chaves v. Johnson*, 335 S.E.2d 97, 101-02 (1985). Speech that does not contain provably false factual connotations, or statements that cannot be interpreted as stating actual facts about a person, cannot form the basis of a common law defamation action. *Fuste*, 575 S.E.2d at 861.

The Virginia Supreme Court has held that statements that are relative in nature and depend largely on the speaker's

viewpoint are expressions of opinion. *Fuste*, 575 S.E.2d at 861; *Chaves*, 335 S.E. at 101; *Jarrett v. Goldman*, 2005 WL 1323115 (Va. Cir. Ct. May 31, 2005) (not yet released for publication) (terminated employee's statement that former colleague "will screw up your accounts because he has screwed up many other accounts"). It recently reaffirmed that defamation cannot stand against a person who believes the statements at issue to be true. *Jordan v. Kollman*, 612 S.E.2d 203 (Va. 2005) (lack of actual malice in creating and paying or advertisements whose statements were believed defeated public figure's defamation cause of action).

Thus, the statements in the Reply could not provide a basis for a defamation claim against Mr. Pilli. Because Rule 8.2 contains express requirements that are identical to those for establishing a defamation claim, authorities governing defamation should be equally applicable here.

c. Rule 8.2 is Limited to Statements of Fact.

Rule 8.2's ethical prohibition applies to "statements," meaning statements of fact rather than opinions. *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000) (attorney's statement to Judge accusing him of being "racist and bigot" and having "bent of mind" protected from disciplinary action as opinion). As here, the attorney in *Green* had successfully represented his client by winning his case when the focus shifted to his own conduct, with no impact on the client related to that conduct. *Green*, 11 P.3d at 1086-87.

The Colorado court emphasized the distinction between violating a disciplinary rule and the quality of an attorney's oral or written statements:

> By clothing [the attorney's] comments with the mantle of the First Amendment, we neither condone the tone of [his] letters nor agree with the conclusions that he drew. We note that the hearing board found that the trial judge "made every reasonable effort to be courteous and

> attentive to the Respondent." The hearing board specifically found that there was no evidence of any bias or prejudice on the trial judge's part. Our review of the record fully supports these findings. The question we decide in this case is whether the First Amendment allows us to discipline [the attorney] for expressing a contrary conclusion. We believe it does not. We therefore dismiss the charges that [the attorney] violated Colo. RPC 8.4.

Green, 11 P.3d at 1087.

Likewise, Mr. Pilli did not violate Rule 8.2 by expressing opinions in the Reply.

C. Factual Statements were neither False nor made with Reckless Disregard for Truth.

On the other hand, statements in the Reply that were entirely factual, or that were a mixture of law and fact, had an objectively factual basis and were neither false nor made with reckless disregard for their truth or falsity; thus, they by definition do not violate Rule 8.2.

An objective standard is used to determine whether a statement is false. *Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001) (standard is objectively reasonable factual basis); *In re Petition for Disciplinary Action Against Nathan*, 671 N.W.2d 578 (Minn. 2003) (falsity of statement about judge determined objectively); *In re Disciplinary Action against Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (same); *U.S. Dist. Ct. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993) (objective determination of whether attorney's statements had reasonable basis); *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996) (objective standard).

After being sanctioned, one attorney stated to the press that the judge had "a penchant for sanctioning Jewish lawyers" and that such actions evinced anti-Semitism. *Standing Comm. on Discipline of U.S. District Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1434 (9th Cir. 1995) (judge had sanctioned three other Jewish attorneys). The attorney wrote that this judge was "one of the worst judges in the United States," and took out an ad asking other sanctioned attorneys to contact him. The California Bar had not adopted the Model Rules, but its rules had an equivalent of Rule 8.2, under which the attorney was charged. *Yagman*, 55 F.3d at 1434. Applying an objective standard to determine whether his statements were entitled to constitutional protection, the court also stated that in order to subject an attorney to discipline, the statements must be capable of being proven true or false. *Yagman*, 55 F.3d at 1438. This is the same standard set forth by this Honorable Court in 1990. *Milikovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21; 110 S.Ct. 2695; 111 L.Ed.2d 1 (1990). The court concluded that statements amounting to nothing more than "rhetorical

hyperbole" will not subject an attorney to discipline. *Yagman*, 55 F.3d at 1438.

Regarding the statement about the judge's penchant for disciplining Jewish attorneys and his anti-Semitism, the statement was a combined statement of fact (not sanctionable) and opinion (could subject attorney to disciplinary action only "if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false"). *Yagman*, 55 F.3d at 1439.

The First Amendment protects expressions of opinion based on facts:

> Likewise, the statement that the judge was dishonest also was found not to be sanctionable: [The attorney's] remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false. *Cf. In re Erdmann*, 33 N.Y.2d 559; 347 N.Y.S.2d 441, 441; 301 N.E.2d 426, 427 (1973) (reversing sanction against attorney who criticized trial judges for being "the whores who became madams")[.]

Yagman, 55 F.3d at 1440-41.

Here, as discussed above, the record of the proceedings below establish that Mr. Pilli appeared in court as instructed by the court clerk's office. *Appx 6-15*. Accordingly, any statement to the contrary was a falsehood. Thus, in filing the Reply asserting that statements regarding his absence from court constituted lying, Mr. Pilli did not violate Rule 8.2, since his statements had an objectively reasonably factual basis and were not false nor made with reckless disregard for truth or falsity.

D. Defenses Based on Truth and Privilege.

Mr. Pilli here hastens to note that he wishes only to set the record straight. These pleadings are meant only to clarify Mr. Pilli's frame of mind regarding the truth of the

statements in the Reply, which by definition accordingly would render the Reply not in violation of Rule 8.2. Because Rule 8.2 contains requirements identical to those for establishing defamation claims, defamation case law should apply here.

1. Truth as Defense.

Truth is a defamation defense. *Saleeby v. Free Press, Inc.*, 91 S.E.2d 405, 407 (Va. 1956) ("slight inaccuracies of expression" immaterial provided defamatory charge is substantially true); *Massey v. Jones*, 28 S.E.2d 623, 623 (Va. 1944) (truth is complete defense barring defamation action); *Guide Pub. Co. v. Futrell*, 7 S.E.2d 133, 133 (Va. 1940); *Rosenberg v. Mason*, 160 S.E. 190 (Va. 1931). Because the Reply would withstand defamation scrutiny for substantial truthfulness, it also should withstand scrutiny here, particularly given the truthful context in light of Virginia law regarding the legal impossibility of a contempt finding under the circumstances. *Saleeby*, 91 S.E.2d at 407.

2. Privilege.

Respondent has made clear that the statements with which it takes issue are limited to those contained in the Reply, which was privileged as a pleading and thus cannot serve as the basis for defamation claims. Again borrowing from defamation law, it is well settled in Virginia that "words spoken or written in a judicial proceeding that are relevant and pertinent to the matter under inquiry are absolutely privileged." *Darnell v. Davis*, 58 S.E.2d 68, 70 (Va. 1950). The reason for the rule of absolute privilege in judicial proceedings is to encourage unrestricted speech in litigation. *Watt v. McKelvie*, 248 S.E.2d 826, 828-29 (Va. 1978). "[T]he public interest is best served when individuals who participate in law suits are allowed to conduct the proceeding with freedom to speak fully on the issues relating to the controversy." *Id.* at 829. The defense of privilege is a matter of public policy, the idea being that by reason of a public or social interest entitled to protection, immunity is granted from liability for defamation that otherwise

would be actionable. *Kinney v. Williamscraft, Inc.*, 14 Va. Cir. 212; 1988 WL 619399, *1 (Va.Cir.Ct. Nov. 30, 1988) (not designated for publication).

The rule of absolute privilege accorded judicial proceedings is not limited to trials. *Donohoe Const. Co., Inc. v. Mount Vernon Assoc's*, 369 S.E.2d 857, 860 (Va. 1988); *Penick v. Ratcliffe*, 140 S.E. 664, 667 (Va. 1927). The rule "is broad and comprehensive, including within its scope all proceedings of a judicial nature. *Donohoe*, 369 S.E.2d at 860; *Penick*, 140 S.E. at 667. This includes "any proceeding for the purpose of obtaining such remedy as the law allows." *Donohoe*, 369 S.E.2d at 860; *Penick*, 140 S.E. at 667; *see also Darnell*, 58 S.E.2d at 71; *Massey*, 28 S.E.2d at 623-24, 626; *James v. Powell*, 152 S.E. 539, 544-45 (Va. 1930).

These proceedings fall within the realm of the absolute privilege accorded to statements in pleadings. The same rationale applies with equal or greater force in the context of proceedings involving the very integrity of the bar – not to mention an individual attorney's professional reputation and very livelihood. The nationwide impact of Rule 8.2 and other rules mirroring its terms establishes that its restrictions affect hundreds of thousands of attorneys across the United States, all of whom would find their candor with any tribunal significantly curbed if truthful statements or opinions in pleadings could lead to sanctions. In this context, it is even more critical that attorneys feel free to express their candid and straightforward views on all relevant matters.

Given Virginia law regarding the impossibility of contempt based on the facts here under *Wise*, the Reply simply expressed Mr. Pilli's earnest view regarding the falsehood that had been uttered by the court regarding his absence from the contempt hearing on December 11, 2001. While its specific language may have been hastily chosen and consequently inartful, the Reply thus should not subject Mr. Pilli to liability for contempt.

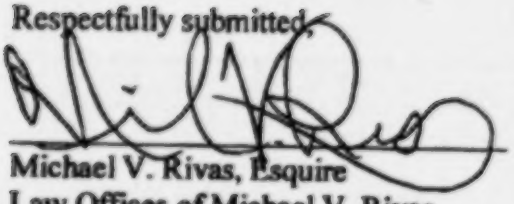
III. CONCLUSION & PRAYER

On December 11, 2001 Mr. Pilli appeared as ordered for a hearing. After passing on it, he notified the prosecutor and his Client that he needed to step out briefly to a nearby courtroom, which was standard practice in Fairfax County. But when he returned, he found that his Client and the matter had been moved to another courtroom on another floor. Virginia law establishes that an attorney cannot be in contempt of court under these circumstances; however, in his absence, Cassidy tried him, issued a contempt order against him, and spoke so negatively about him that his Client was scared to the point of questioning whether to retain him. Mr. Pilli hastily filed the Reply in an (albeit heated) attempt to correct Cassidy's erroneous conclusions. There is no basis in law or fact for concluding that Mr. Pilli acted contemptuously – much less in *willful* contempt. Punishing him for truthful statements or for expressing opinions regarding the application of long-standing law would have a chilling First Amendment impact on attorneys nationwide.

Mr. Pilli's suspension already has begun; the bell cannot be unrung. The damage to his business and reputation is wrong, unjustified, and something that only this Honorable Court can correct by reversing the incorrect conclusion below. Mr. Pilli seeks a writ of certiorari on principle, since there is no way to compensate him for losing ninety days of income or for sustaining serious damage to his professional reputation.

Mr. Pilli seeks nothing more than that the record be set straight, establishing that he neither acted in willful contempt of court, nor made comments in the Reply that were false or untrue. Accordingly, he respectfully requests that this Court reverse the decision of the Virginia Supreme Court.

Respectfully submitted,



Michael V. Rivas, Esquire
Law Offices of Michael V. Rivas
3540 Lincoln Street
Franklin Park, Illinois 60131
Telephone 847-928-1936
Facsimile 847-928-0071

(2)

Supreme Court, U.S.
FILED

05-247 JUL 20 2005

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOMINICK A. PILLI, *Petitioner,*

versus

VIRGINIA STATE BAR, *Respondent*

ON APPEAL FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael V. Rivas, Esquire
Law Offices of Michael V. Rivas
3540 Lincoln Street
Franklin Park, Illinois 60131
Telephone 847-928-1936
Facsimile 837-928-0071

APPENDIX

The information required to be included in the Appendix is voluminous and is presented in this separate volume.

For ease of reference, the Table of Contents reflects the starting page of each document in the Petition for Certiorari Appendix. Further, in the Petition for Certiorari, the same page numbers as were used in the Joint Appendix filed with the Virginia Supreme Court below are referenced in the Petition for Certiorari and cross-referenced herein in parentheses, just above the actual Table of Contents page number. The Virginia Supreme Court Joint Appendix page numbers are in parentheses above the US Supreme Court Appendix Table of Contents page number.

TABLE OF CONTENTS

EXHIBITS — PAGE NUMBER

1. Dominick A. Pilli v. Virginia State Bar,
   Record Number 042630
   (Order dated: April 22, 2005).....1

2. Dominick A. Pilli v. Virginia State Bar,
   Record Number 042630
   (Order dated: June 8, 2005).....14

3. Dominick A. Pilli v. Virginia State Bar,
   Record Number 042630
   (Order dated: June 14, 2005).....15

4. Dominick A. Pilli v. Virginia State Bar,
   Application Number 04A1062
   (Dated: June 21, 2005).....16

5. Dominick Anthony Pilli v. VSB
VSB Docket Number 02-051-2053
(Dated: June 23, 2005).....18

6. Respondent Determination & Order,
January 8, 2004 and September 20, 2004 **(p. 1-15)**.....21

7. Excerpt from Deposition of Michael
Cassidy **(p. 125)**.....48

8. Excerpts from Deposition of Dominick Pilli
(p. 151-155, 158, 161-166, 180-182).....50

9. Continuance Request **(p. 186)**.....81

10. Show Cause Summons **(p. 188)**.....82

11. Motion to Rehear **(p. 189)**.....83

12. Voice Mail Transcription **(p. 190-191)**.....84

13. Correspondence from Mr. Pilli to court clerk
Nancy Lake, Oct. 30, 2001 **(p. 193-194)**.....88

14. Correspondence from Lake to Mr. Pilli, Nov.
26, 2001 **(p. 196)**.....91

15. Continuance Request **(p. 197)**.....93

16. Fairfax County District Court Contempt Order,
Dec. 11, 2001 **(p. 198-199)**.....94

17. Docket Call Sheet noting presence and pass of
Show Cause hearing **(p. 202)**.....97

18. Fairfax County District Court Supplemental
Order, Dec. 12, 2001 **(p. 203-204)**.....98

19. Reply to Supplemental Order **(p. 205-210)**.....100

20. Circuit Court Order, Feb. 19, 2002 **(p. 211)**.....109

21. Response to Bar Complaint **(p. 212-217)**.....111

PRESENT: Hassell, C.J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Compton, S.J.

DOMINICK ANTHONY PILLI

v. Record No. 042630

OPINION BY JUSTICE BARBARA MILANO KEENAN

April 22, 2005

VIRGINIA STATE BAR

FROM THE VIRGINIA STATE BAR DISCIPLINARY BOARD

This case presents an appeal of right from a ruling of the Virginia State Bar Disciplinary Board (the Board). Dominick Pilli challenges the Board's order suspending his license to practice law in the Commonwealth for a period of 90 days based on its finding that Pilli violated Rule 8.2 of the Virginia Rules of Professional Conduct.

The Board found that Pilli made certain statements with reckless disregard as to their truth or falsity concerning the qualifications and integrity of a judge. The issue before us is whether the Board's finding is supported

Exhibit 1

by a reasonable view of the evidence and is in accordance with the law. See Williams v. Virginia State Bar, 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001); Myers v. Virginia State Bar, 226 Va. 630, 632, 312 S.E.2d 286, 287 (1984).

In October 2001, Judge Michael J. Cassidy of the Fairfax County General District Court issued a "show cause" summons against Pilli charging him with failing to appear in court regarding a misdemeanor traffic offense for which Pilli was counsel of record. In response, Pilli filed a "motion to remove show cause," requesting dismissal of the summons based on his understanding that the traffic case had been continued to a date in January 2002. A few days later, Judge Cassidy heard argument on Pilli's motion, denied the motion, and set the show cause hearing and underlying traffic case for trial on December 11, 2001.

Pilli failed to appear before Judge Cassidy on December 11, 2001, when the show cause matter and traffic case were "called" in court. Judge Cassidy tried Pilli in his absence, found him in contempt of court, and

imposed a $250 fine. Later that afternoon, Pilli filed a motion to rehear, which he argued the next day. On December 12, 2001, Judge Cassidy refused to set aside his contempt finding, but suspended $150 of the fine. Judge Cassidy set forth his findings in two orders, which recited the proceedings in the matter.

On December 28, 2001, Pilli filed a "Reply to Supplemental Order of Judge Cassidy (December 12, 2001)" (the Reply). The stated purpose of the Reply was "to clarify the errors which Judge Cassidy has so negligently and carelessly, (a second time) failed to give consideration to, in these matters." Pilli accused Judge Cassidy of "skewing . . . the facts" and "fail[ing] to tell the truth." Pilli further stated, "I cannot tolerate a Judge lying to this Court, to this Attorney, to the Judicial Review Commission and to the Virginia State Bar. He is flat out inaccurate, and wrong." Pilli also threatened to use his "influence ... to have [Judge Cassidy] removed" from office.

Pilli appealed his contempt conviction to the circuit court, which found him guilty of the charge. The court sentenced Pilli to serve four days in jail.

In January 2004, a subcommittee of the Virginia State Bar (the Bar) certified four charges of misconduct against Pilli to the Board. The Bar charged Pilli with: (1) making a false statement of fact to a tribunal and offering evidence that the lawyer knows to be false, in violation of Rule 3.3; (2) committing a criminal or deliberately wrongful act that reflects adversely on the lawyer's fitness as a lawyer, in violation of Rule 8.4(b); (3) engaging in professional conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(c); and (4) making a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge, in violation of Rule 8.2.

In August 2004, the Board held a hearing on the four charges of misconduct. The Board ultimately

dismissed the charges relating to the alleged violations of Rule 3.3, Rule 8.4(b), and Rule 8.4(c), and found Pilli in violation of Rule 8.2.

The Board received evidence concerning Pilli's failure to appear in court on both October 16, 2001 and December 11, 2001, and Pilli's actions in drafting the Reply "pleading." The evidence presented by the Bar showed that Pilli initially had requested a four-month continuance of a misdemeanor traffic charge set for September 17, 2001. Based on the general district court's administrative procedures, the court clerk processing the request was only authorized to continue the case to the arresting officer's next available court date, October 16, 2001.

A continuance of the misdemeanor charge beyond the officer's first available date could be obtained only with the approval of a judge. Under the court's procedures, upon submitting his continuance request, Pilli would have been instructed to contact the clerk's office after September 18,

2001, to confirm whether a judge had agreed to the extended continuance and to obtain the new hearing date.

The traffic case was continued to October 16, 2001. Judge Cassidy testified that Pilli did not appear on that date or on December 11, 2001. Judge Cassidy further stated that when the show cause summons was called for trial on December 11, 2001, court personnel were unable to locate Pilli anywhere in the courthouse.

Pilli testified that his secretary verified with court personnel that the traffic case was continued to January 17, 2002. Pilli admitted that he did not appear in Judge Cassidy's courtroom on December 11, 2001, when the show cause summons was called for trial, because he was attending to another matter in a nearby courthouse. He stated that he had asked the prosecutor handling the show cause summons to "pass" the case until he returned.

According to Pilli, when he arrived back at the Fairfax County Court House, the courtroom to which his case was assigned was closed. Pilli stated that he wrote the

Reply "emotionally" because he was "upset" and "frustrated" with the manner in which Judge Cassidy handled the show cause matter.

The Board found by clear and convincing evidence that Pilli "made statements with reckless disregard concerning Judge Cassidy's qualifications and integrity." The Board further found that Pilli's Reply contained "numerous statements which are inappropriate, without basis in fact, and which clearly accuse Judge Cassidy of mendacity and incompetence." After considering Pilli's prior disciplinary record, which included two public reprimands and two private reprimands, the Board suspended Pilli's license to practice law for 90 days. Pilli appeals.

Pilli argues that the Bar failed to present clear and convincing evidence to support a violation of Rule 8.2. Pilli asserts that his statements in the Reply were "merely opinions," and that Rule 8.2 only applies to statements of fact. Pilli argues alternatively that any statements in the

Reply that were factual in nature had an objectively reasonable basis and were not made with reckless disregard as to their truth or falsity.

In response, the Bar argues that the statements Pilli made in his Reply establish by clear and convincing evidence that he violated Rule 8.2. The Bar asserts that Pilli's numerous accusations that Judge Cassidy lied clearly impugned the judge's integrity and were made with reckless disregard as to their truth or falsity.

We consider the parties' arguments under an established standard of review. In reviewing the Board's decision in a disciplinary proceeding, we conduct an independent examination of the entire record pertaining to the charge before us. Williams, 261 Va. at 264, 542 S.E.2d at 389; El-Amin v. Virginia State Bar, 257 Va. 608, 612, 514 S.E.2d 163, 165 (1999); Myers, 226 Va. at 632, 312 S.E.2d at 287. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the Board